THE STATE OF NEW HAMPSHIRE

THE ATTORNEY GENERAL
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January 11, 1978

Frank E. Whaland, Commissioner
Insurance Department
169 Manchester Street
Post Office Box 2005
Concord, New Hampshire 03301

Dear Commissioner Whaland:

This is in reply to your letter of May 19, 1977 requesting a formal opinion from this office with regard to the following questions:

1. Under RSA 412:4 (as it existed in May of 1977), can the Insurance Commissioner impose an administrative penalty less severe than revocation or suspension of the Company's license when the Commissioner finds that the Company has issued a policy form in violation of the provisions of Chapter 412 or after having been forbidden to do so by the Commissioner under the provisions of Chapter 412?

2. If RSA 412:4 is amended as in SB 276, and if the Commissioner makes his finding after the effective date of the amendment, can the penalty provisions of the amended statute be applied to a violation which occurred in 1976 (i.e., prior to the amendment)?

For the reasons outlined below the answers to your questions are that a less severe penalty may not be imposed under RSA 412:4 as it existed prior to amendment in 1977, but that the amended statute may be applied to a violation which occurred prior to the amendment.

In May of 1977, RSA 412:4 provided:

> Forfeiture of License. If any insurer shall issue any policy in violation of the provisions of this chapter, or any policy which it has been forbidden to issue by the Commissioner under the provisions hereof, it shall forfeit its license to do business in this state, and shall not be again licensed for three years.

This language is unequivocal and straightforward and makes no allowance for the exercise of administrative discretion on the part of the Commissioner. The analysis which accompanied Senate Bill 276, introduced by Senator Rock on April 27, 1977, in order to amend section 412:4 correctly refers to the three year forfeiture as an "absolute requirement."

The Commissioner's duty to administer this forfeiture is imposed by RSA 400-A:3 which provides in relevant part:

> The head of the department shall be the insurance commissioner who is charged with the rights, powers, and duties pertaining to the enforcement and execution of the insurance laws of this state. The Commissioner shall have all powers specifically granted to him or reasonably implied in order to enable him to perform the duties imposed upon him by this title. (emphasis supplied)

The answer to your first question therefore is that, upon issuance of a disapproved policy, forfeiture of an insurer's license for three years was made mandatory by the provisions of RSA 412:4 at the time of your request.

With respect to your second question, RSA 412:4 was amended effective September 10, 1977, by Chapter 475 of the Laws of 1977, and now provides this:

> If any insurer shall issue any policy in violation of the provisions of this chapter, or any policy which it has been forbidden to issue by the commissioner under the provisions hereof, the commissioner may, upon hearing, suspend or revoke said insurer's certificate of authority or license for a period not to exceed 3 years, impose an administrative fine in lieu of such suspension or revocation, or take such other administrative action against the offending company as the commissioner, in his discretion, may determine. The commissioner shall not be bound by the limitations on penalty contained in RSA 400-A:15, III in the enforcement of this section.

This amendment has removed the required three-year forfeiture and allows, as of September 10, 1977, the exercise of the Commissioner's discretion within the limits stated above. You have asked whether this amendment may be applied to a violation which occurred while the prior law was in force. A traditional principle of common law which has found expression in both the New Hampshire and United States Constitutions prohibits retroactive application of new or greater penalties. It has long been recognized by the New Hampshire Supreme Court and the United States Supreme Court that ex post facto or retroactive application of a penalty is only unconstitutional and therefore prohibited when the penalty has been increased or has been imposed for the first time. Reduction of a penalty may be applied retroactively.

Article 23 of Part I of the New Hampshire Constitution provides:

> Retrospective laws are highly injurious oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses.

The New Hampshire Supreme Court has interpreted this article to prohibit only original imposition or increase of punishment for an act occurring prior to the legislation in question. Mitigation of punishment has been adjudged not to be "injurious, oppressive or unjust" and therefore not subject to a declaration of unconstitutionality. This principle has been held applicable both to criminal and civil cases.

> It is worthy of remark, that it is not declared in the article of our bill of rights, which we are now considering, that no retrospective law ought to be made for the trial of criminal causes, but that no such laws ought to be made for the punishment of offenses. A statute, on which a prosecution of a crime depends, may be repealed, and the prosecution thus defeated; yet, although the act effecting such repeal is a retrospective law for the decision of the cause, it is not within the prohibition of this article, because it is not retrospective law for the punishment of an offense. Woart v. Winnick, 3 N.H. 473, 476 (1826).

Cf. Clark v. Clark, 10 N.H. 380, 388 (1839), Simpson v. Savings Bank, 56 N.H. 466, 473 (1876), Bourque v. Adams, 93 N.H. 257, 258, 259 (1945).

The United States Supreme Court has likewise concluded that the prohibition against ex post facto laws in the United States Constitution does not extend to retroactive mitigation of a penalty. Article I Section 10 of the United States Constitution provides in pertinent part that, "No state shall ... pass any ... ex post facto law."

The Supreme Court first considered ex post facto laws in 1798 in the case of Calder v. Bull, 3 Dall (U.S.) 386, which remains the authoritive consideration of that subject. Mr. Justice Chase wrote, with respect to a Connecticut statute

which created a right of appeal where none had previously been allowed, that a law is ex post facto, and therefore prohibited, if it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed" and continued:

> But I do not consider any law ex post facto within the prohibition, that mollifies the rigor of the criminal law ... Calder v. Bull ibid 390, 1 L.Ed. 648, 650 (1798).

Similarly in Rooney v. North Dakota, 196 U.S. 319, 49 L.Ed. 494 (1904), the Court stated unequivocally that "...a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as ex post facto with reference to that crime." Rooney v. North Dakota, ibid, 325, 49 L.Ed. 494 (1904) cf. Payne v. Nash, 327, F.2d 197, 199 (1964), Rebideau v. Moevkens, 312 A.2d 926, 927 (1973).

These and other cases have applied this principle of retroactivity to statutes affecting both criminal and civil law. While an administrative penalty such as that which is the subject of RSA 412:4 does not fall precisely in either statutory category, it is well within the scope that these two areas encompass.

In order to decide whether this principle applies to Section 412:4 it is necessary to determine whether the amendment represents a reduction or mitigation of the former penalty. It is clear with respect to license forfeiture that the new law eliminates the requirement of a three year suspension. It instead makes possible a shorter term of suspension and, in doing so, has reduced the severity of the old penalty. However, the amended version of Section 412:4 additionally contemplates alternatives to suspension. The Commissioner "may impose an administrative fine in lieu of such suspension, or take such other administrative action ... as the Commissioner, in his discretion, may determine." The new statute then states that the limitations of RSA 400-A:15 (III) shall not be applied to the Commissioner's exercise of discretion granted by RSA 412:4. Section 400-A:15 (III) provides:

> Any person who knowingly violates any rule, regulation or order of the commissioner may ... be subject to such suspension or revocation of certificate of authority or license, or administrative fine not to exceed $2,500 in lieu of such suspension or revocation, as may be applicable under this title for violation of the provision to which such rule, regulation or order relates.

The result of the above-cited provision is that the administrative fine imposed in lieu of suspension under the amended version of Section 412:4 is not subject to the $2,500 limitation in Section 400-A:15 (III). (Indeed it is not subject to any dollar amount limitation so long as the fine is not so unreasonable under the circumstances as to constitute a clear abuse of discretion.) Should the commissioner impose a fine for a violation which occurred prior to the amendment, the fine would have to constitute less of a penalty than a three year forfeiture. For example, a retroactively imposed fine should be less in amount than whatever lost revenues would result from a three year inability to do business in New Hampshire. Likewise, any "other administrative action" would have to be clearly less severe than a three year forfeiture of license if it were to be imposed retroactively.

For the reasons stated above, the answer to your second question is that the penalty provisions of N.H. RSA 412:4 as amended by the Chapter 475 of the Laws of 1977 may be applied to a violation which occurred prior to the effective date of the amendment so long as the penalty is less severe than a three year forfeiture.

Very truly yours,

David H. Souter,
Attorney General

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Attorney